United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: <u>In re HANDY ANDY HOME IMPROVEMENT CENTERS, INC.</u>

Bankruptcy No. <u>95 B 21655</u>

Adversary Caption:

Adversary No.

Date of Issuance: <u>JULY 9, 1997</u>

Judge: <u>ERWIN I. KATZ</u>

Appearance of Counsel:

Attorney for Movant or Plaintiff: <u>CATHERINE STEEGE</u>

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Trustee or Other Attorney <u>JOHN VOORHEES</u>

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HANDY ANDY HOME IMPROVEMENT CENTERS, INC.,	)	Case No. 95 B 21655
	)	
	)	Honorable Erwin I. Katz
Debtor.	)	

MEMORANDUM OPINION

This matter comes before the Court on the Motion of Martin Merksamer ("Merksamer"), for Summary Judgment on the objection of the Official Committee of Unsecured Trade Creditors (the "Committee") of Handy Andy Home Improvement Centers, Inc. (the "Debtor") to Merksamer's Proof of Claim. The issue before the Court is whether Merksamer is entitled as a matter of law to his claim against the Debtor for severance pay, prorated bonus payment, interest and attorneys' fees and costs incurred in defending his claim . For the reasons set forth herein, Merksamer's motion is granted in part and denied in part.

FACTUAL BACKGROUND

On February 1, 1995, the Debtor issued an offer of employment to Merksamer as Vice President-Specialty Stores, which Merksamer accepted (the "Letter Agreement"). Pursuant to the Letter Agreement, Merksamer was to receive an annual salary of $160,000, plus benefits. In addition, Merksamer was to entitled to (1) a short-term bonus of an amount equal to $56,000 times the number of days he was employed in 1995 divided by 365 days; and, (2) severance pay equal to one year's base salary in the event of termination for reasons other than "dishonesty, fraud, or other similar act." On or about September 19, 1995, the Debtor increased Merksamer's annual base salary to $170,000.22.

On October 12, 1995, an involuntary bankruptcy petition was filed against the Debtor. On November 1, 1995, the Debtor consented to the entry of an order for relief under Chapter 11. Thereafter, the United States Trustee appointed the Committee and the Official Committee of Unsecured Bank Creditors.

On February 14, 1996, the Debtor issued a letter to Merksamer, among others, stating that his employment was to be terminated as of an unspecified date. The letter also notified Merksamer and the Debtor's other corporate and distribution center employees that (a) the Debtor would be filing a motion with the Court to approve a severance pay plan for corporate and distribution center employees and that (b) "the plan will require the execution of a release prior to receiving severance pay."

On February 16, 1996, the Debtor filed a Motion for Approval of Key Employee Retention, Shrinkage Reduction and Severance Programs, which this

Court granted on February 21, 1996. Pursuant to this motion and this Court's order, the Debtor was authorized to implement a severance program whereby its corporate and distribution center employees would receive one week of severance pay for each year of employment with the Debtor not to exceed six weeks of pay (the "Authorized Severance Program").

On February 16, 1996, the Debtor issued a second letter to Merksamer notifying him not to report to work after March 1, 1996. Merksamer was terminated effective that date. Merksamer was not terminated by reason of "dishonesty, fraud, or other similar act." Beginning February 25, 1996, Merksamer received six checks from the Debtor in the aggregate amount of $23,339.61. Merksamer never executed a release in exchange for the payments.

On or about March 18, 1996, Merksamer filed a proof of claim seeking a total claim of $212,958.90[1] of which $4,000 is a priority claim and the remainder is unsecured.

On August 12, 1996, the Court entered an order confirming the Debtor's Plan of Reorganization dated June 28, 1996 (the "Plan"). On August 14, 1996, the Committee filed an objection to Merksamer's proof of claim.

SUMMARY JUDGMENT STANDARD

[1]$212,958.90 = $170,000 in severance pay + $42,958.90 as a bonus payment.

For a party to prevail on a motion for summary judgment, the movant must establish that:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.

Fed. R. Bankr. P. 7056(c); see also Donald v. Polk County, 836 F.2d 376, 378-379 (7th Cir. 1988). "The primary purpose for granting a summary judgment motion is to avoid unnecessary trials where there is no genuine issue of material fact in dispute." Farries v. Standadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987), quoting Wainwright Bank & Trust Co. v. Railroadmens Federal Sav. & Loan Assoc., 806 F.2d 146, 149 (7th Cir. 1986). The burden is on the moving party to show that there is no genuine issue of material fact in dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585-586 (1986). There is no genuine issue for trial if the record, taken as a whole, does not lead a rational trier of fact to find for the non-moving party. Matsushita, 475 U.S. at 587.

DISCUSSION

The parties agree that an enforceable contract was entered into between the

Debtor and Merksamer when Merksamer accepted the Letter Agreement. The Committee disputes Merksamer's claim on several grounds. First, the Committee argues that Merksamer should be barred from asserting a claim either under the principles of equitable estoppel or waiver. Second, should this Court find that Merksamer is entitled to assert a proof of claim, the Committee disputes the amount of Merksamer's claim as filed for several reasons including that Merksamer is not entitled to a prorated bonus, attorneys fees and costs or a priority claim of $4,000. And, third, the Debtor contends that, to the extent allowed, Merksamer's claim should be subordinated pursuant to the doctrine of equitable subordination. The Court shall address each contention in turn.

Waiver

Waiver is the intentional relinquishment of a known right either expressly or by conduct inconsistent with enforcement of the right. Hystro Products, Inc. v. MNP Corp., 18 F.3d 1384, 1393 (7th Cir. 1984), citing, J.H. Cohn & Co. v. American Appraisal Assocs., Inc., 628 F.2d 994, 1000 (7th Cir. 1980); see also, City of Chicago v. Chicago Fiber Optic Corp., 287 Illl.App.3d 566, 678 N.E.2d 693, 222 Ill.Dec. 821 (1st Dist. 1997). There has been no evidence of an express waiver, nor an intentional relinquishment of any rights. The party claiming an implied waiver has the burden of proof to show that its opponent manifested its intention to waive its right by a clear, unequivocal and decisive act. Id., citing Greene v. Helis, 252 Ill.App.3d 957, 962, 625 N.E.2d 162, 192 Ill.Dec. 202 (1st Dist. 1993).

The Committee argues that by causing the Debtor to pay him at least $23,339.61 pursuant to the Authorized Severance Program, Merksamer demonstrated an intent to waive his claim for any additional severance or a bonus. This Court does not agree.

First, Merksamer did not sign a waiver. Second, the Committee has made no showing that Merksamer caused anything, only that he received the payment. Lastly, the checks issued to Merksamer contained no restrictive endorsements indicating that they constituted full payment of the debt owed to Merksamer. Under Illinois law, a tender of partial payment by a debtor results in an accord and satisfaction only when there is a dispute between the parties and when there is an explicit understanding by both parties that such payment is in full satisfaction of the dispute. In re West Side Community Hosp., 112 B.R. 243, 254 (Bankr. N.D. Ill. 1990) citing Lowrance v. Hacker, 866 F.2d 950, 952 (7th Cir. 1989). Merksamer did not, by accepting partial payment of the amount that he claims due him, waive entitlement to the rest of his compensation, (see, Bristow v. Drake Street Inc., 41 F.3d 345, 348 (7th Cir. 1994), citing Hepperly v. Bosch, 172 Ill.App.3d 1017, 527

N.E.2d 533, 123 Ill. Dec. 70 (1988)), and may assert a proof of claim for that sum.[2]

Equitable Estoppel

The Committee argues that Merksamer is equitably estopped from asserting a claim against the Debtor because Merksamer caused the Debtor to pay him at least $23,339.61 under the Authorized Severance Program without signing a release or advising the Debtor that he intended to file a proof of claim for additional severance and bonus payments. The Committee further argues that Merksamer intended or expected that the Debtor would rely upon his misrepresentation,[3] and that the Debtor relied on Merksamer's misrepresentations to its detriment.

Estoppel arises when a party's conduct misleads another to believe that a right will not be enforced and causes that party to act to its detriment in reliance upon this belief. Slaverslak v. Davis-Cleaver Produce Co., 606 F.2d 208, 213 (7th Cir. 1979), cert. denied, 444 U.S. 1078, 100 S.Ct. 1029, 62 L.Ed.2d 762 (1980). The purpose of estoppel is to prevent a party from benefitting from its own misrepresentations. Black v. TIC Investment Corp., 900 F.2d 112, 115 (7th Cir.

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[2]Inasmuch as this Court finds that Merksamer did not waive his right to assert a proof of claim against the Estate, it need not address whether the Authorized Severance Program preempts the Wage Payment and Collection Act, 820 ILCS §115/1 *et seq.*, which states that an employee's acceptance of a disputed paycheck does not constitute a release of the balance of his claim for disputed wages.

[3]The Committee alleges that the Debtor would not have paid Merksamer $23,339.61 if it knew that Merksamer did not intend to sign a release and that he planned to file a proof of claim.

1990). Even when a party has not waived a known right, he may be estoppel from enforcing it. Slaverslak, 606 F.2d at 213. The Committee is, therefore, required to show that, in reliance on some words or conduct of Merksamer, it believed Merksamer would not pursue a proof of claim against the estate, and so it issued Merksamer $23,339.61 as a severance payment.

The conduct of Merksamer, upon which the Committee predicates its estoppel argument, is the failure of Merksamer to affirmatively notify the Committee that he intended to pursue a proof of claim in addition to the severance money he accepted from the Debtor upon his termination. The Committee contends that Merksamer's silence on this issue amounts to concealment of a material fact.

Equitable estoppel cannot be based on a party's silence unless that party has an affirmative duty to speak. Joliet Mass Transit Dist. v. Illinois Fair Employment Practices Comm., 85 Ill.App.3d 270, 273, 407 N.E.2d 80, 40 Ill.Dec. 849 (3d Dist. 1980). This duty may arise when there is a special relationship between the parties. No such special relationship exists here.

The Committee has presented no evidence that Merksamer misrepresented his intentions. It is disingenuous for the Committee to argue that it relied on Merksamer's failure to execute a waiver as proof that he would not pursue a proof of claim against the Estate. There is no evidence before the Court that Merksamer was given a release to sign prior to receiving that $23,339.61 severance payment. Furthermore, under the order which approved the Authorized Severance Program no waiver is required to participate in the program.

The Committee has failed to show that Merksamer misrepresented his intentions to file a proof of claim or that the Committee relied on Merksamer's actions. Accordingly, Merksamer will not be estopped from asserting his proof of claim.

Contractual and statutory rights to severance pay and prorated bonus

The Letter Agreement states that Merksamer's bonus "will be guaranteed and paid April 1, 1996 (so long as you are employed at that time)." The Committee does not dispute that the contract is binding on the parties, however, it argues that Merksamer's interest in the bonus did not vest at the time of his termination because he was not employed by the Debtor on April 1, 1996, the date of the bonus pay-out.[4]

Under Illinois law, a terminated employee has a vested right to receive

[4]The Committee does not dispute that one year's severance pay is owing under the Letter Agreement. However, it argues that Merksamer is barred from asserting his claim, or alternatively, that his claim for severance is overstated and, to the extent allowed, should be equitably subordinated to the claims of other creditors. The Court finds that Merksamer is not barred from asserting a claim, see supra. The other issues are discussed infra.

promised severance pay and earned bonuses upon performance in reliance of that promise. See, Kulins v. Malco, 121 Ill.App.3d 520, 459 N.E.2d 1038, 76 Ill.Dec.903 (5th Dist. 1984) and Camillo v. Wal-Mart Stores, Inc., 221 Ill.App.3d 614, 582 N.E.2d 729, 164 Ill.Dec.166 (5th Dist. 1991), cert. denied, 144 Ill.2d 631, 591 N.E.2d 20, 164 Ill.Dec. 166 (1992). The Kulins court held that severance pay is a form of deferred compensation and when services were rendered by the employee, the employee's right to the promised compensation vested as much as the right to receive wages or any other form of compensation. 121 Ill.App.3d at 526. The court further held that "the lack of a promise to vest does not revoke the employer's obligation to pay." Id.

The Camillo court, citing Kulins, held that a promised bonus is also compensation to which the employee is entitled to a pro rata share. 221 Ill.App.3d at 623. The bonus program in that case was similar to the one at issue here. In Camillo, the program provided that the assistant managers were to be paid a bonus each year to be calculated as follows:

> The amount of the bonus is based on two things, corporate net profit and length of service...The assistant manager must be on the payroll and actively working on January 31, or they will forfeit their bonus.

221 Ill.App.3d at 616. The employee in Camillo was terminated on December 31, 1986 and the employer refused his bonus for that fiscal year because he was not

employed on the requisite date of January 31, 1987. Id. The court found that the employer made it impossible for the employee to fulfill the condition precedent set by the employer, namely being employed on January 31. Id. at 622. The court, therefore, held that pursuant to the principles of promissory estoppel and the requirements of honesty and fair dealing, the employee was entitled to a pro rata share of his bonus. Id.

Merksamer's promised bonus was an "earned bonus." The Illinois Wage Payment and Collection Act ("Wage Act") 820 ILCS 115/1 *et. seq* provides that employees must be timely and properly paid all final compensation owed at time of separation. "Final compensation" is defined as

> wages, salaries, earned commissions, earned bonuses, and the monetary equivalent of earned vacation and earned holidays, and other compensation owed the employee by the employer pursuant to an employment contract or agreement between the two parties.

820 ILCS 115/2 (emphasis added). The Illinois Department of Labor's rules in interpreting the Wage Act also provide that a terminated employee is entitled to the pro rata share of earned bonuses upon termination. Section 300.500(b) of the rules states:

> A former employee shall be entitled to a proportionate share of a bonus earned by length of service, regardless of any provisions in the contract or agreement conditioning the payment of the bonus upon employment on a particular date.

56 Ill. Admin. Code §300.500(b).

This Court finds the reasoning of Kulins and Camillo persuasive and holds that the severance pay and prorated bonus promised to Merksamer are in the nature of deferred compensation and were, therefore, owed to Merksamer at the time of his termination.

Allowance of Interest

Merksamer argues that pursuant to the Illinois Interest Act, he is entitled to interest on the compensation owing to him and withheld by the Debtor since his termination. The Interest Act provides creditors with 5% interest on "monies withheld by an unreasonable and vexatious delay of payment." 815 ILCS 205/2. Merksamer contends that the Committee's objections to his proof of claim were unreasonable and have resulted in a vexatious delay of payment.

Merksamer also submits Illinois case law which support the allowance of interest on compensation improperly withheld from an employee by the employer. See, Dow v. Columbus-Cabrini Medical Center, 274 Ill.App.3d 653, 659-660, 655 N.E.2d 1, 211 Ill.Dec. 341 (1st Dist. 1995), cert. denied, 164 Ill.App.2d 561, 660 N.E.2d 1267, 214 Ill.Dec. 318 (1995) (employee entitled to receive prejudgement interest on compensation for sick days which were improperly withheld); see also Anerson v. Board of Trustee, 210 Ill.App.3d 844, 853, 569 N.E.2d 252, 155 Ill.Dec.

252 (5th Dist. 1991) (terminated employee was not entitled to receive prejudgment interest on his breach of contract claims against his former employer because the employer had good faith defenses to the breach of contract claims.).

Although interest on monies owed may be authorized by both Illinois statute and case law, neither are controlling here. This case arises under a confirmed bankruptcy reorganization plan. The bankruptcy code provides that "the provisions of a confirmed plan bind the debtor,...and any creditor,...whether or not the claim or interest of such creditor,...is impaired under the plan and whether or not such creditor,...has accepted the plan." 11 U.S.C. §1141(a). When state law is contrary to federal bankruptcy law, under the Supremacy Clause, the bankruptcy provisions prevail. Ocasek v. Manville Corp. Asbestos Disease Compensation Fund, 956 F.2d 152, 154 (7th Cir. 1992).

Section 1.6 of the Plan provides that "[i]nterest accrued after the Filing Date shall not be part of any Unsecured Claim." Since this is a pre-petition claim, the terms of the Plan govern any award of interest due to Merksamer. Accordingly, Merksamer is not entitled to any interest on his claim.

Allowance of Costs and Attorneys' Fees

Merksamer also argues that pursuant to the Illinois Attorneys Fees in Wage Actions Act, he is entitled to attorneys' fees and costs incurred to defend his proof of claim. The Wage Actions Act provides:

> Whenever a[n] employee brings an action for wages earned and due and owing according to the terms of the employment, and establishes by the decision of the court or jury that the amount for which he or she has brought the action is justly due and owing, and that a demand was made in writing at least 3 days before the action was brought, for a sum not exceeding the amount so found due and owing, then the court shall allow to the plaintiff a reasonable attorney fee of not less than $10, in addition to the amount found due and owing for wages, to be taxed as costs of the action.

705 ILCS 225/1. Courts interpreting the Wage Actions Act have held that this statute is in derogation of the common law and is, therefore, to be strictly construed. See, Swanson v. Village of Lake in the Hills, 233 Ill.App.3d 58, 68, 598 N.E.2d 430, 174 Ill.Dec. 233 (2nd Dist. 1992), cert. denied, 147 Ill.2d 637, 606 N.E.2d 1235, 180 Ill.Dec. 158 (1992); Dallis v. Don Cunningham & Assoc., 796 F.Supp. 1127, 1128 (N.D. Ill. 1992); Caruso v. Board of Trustees, 129 Ill.App.3d 1083, 473 N.E.2d 417, 85 Ill.Dec. 49 (1st Dist.1984). The "statute must be complied with in every particular to entitle a plaintiff to recover attorney's fees." Swanson, 233 Ill.App.3d at 68. The statute requires the employee to make a written demand upon the employer at least three days prior to bringing an action. See, Id. (Police officer was not entitled to attorneys fees because he did not make a written demand directly to his employer at least three days before bringing action for vacation and disability pay). An employee's demand must be for a sum not exceeding the amount found to

be due and owing; "if the demand exceeds the amount established to be due at trial, no attorney fees can be recovered." Caruso, 129 Ill.App.3d at 1088 (The Court held that the plaintiff did not comply with the provisions of the statute because she sought to recover pension benefits in excess of what she was entitled to receive.)

This Court finds that filing a proof of claim is "bringing an action" as contemplated by the Illinois legislature. Merksamer did not make a written demand upon the Debtor prior to filing his proof of claim. Merksamer also demands an amount greater than he would recover at trial; his proof of claim does not credit the Debtor for the $23,339.61 already advanced to him. Accordingly, he is not entitled to attorney's fees or costs.[5]

§502(b)(7) caps on claims for compensation

Section 502(b)(7) of the Bankruptcy Code limits claims by a terminated employee for compensation to one year's pay. §502(b)(7) provides that if a claim is

> the claim of an employee for damages resulting from the termination of an employment contract, [the claim should be disallowed to the extent] such claim exceeds--
>
> (A) the compensation provided by such contract, without acceleration, for one year following the earlier of--
>
> (I) the date of the filing of the petition; or

[5]Inasmuch as Merksamer's claim for fees and costs is denied in its entirety, this Court need not address whether Merksamer's amendment to his proof of claim to include costs and fees is a "Penalty Claim" under the Plan and therefore, should be subordinated, to the extent of the amendment, to the claims of other unsecured creditors.

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

11 U.S.C. §502(b)(7). Under §502(b)(7), Merksamer's severance claim under the Letter Agreement is limited to one year's salary following the petition date, that being the earlier date. Under the Letter Agreement, Merksamer's annual salary was $170,000.22 as of the petition date, so §502(b)(7) caps the allowed severance payment at that amount.

The Committee argues that the prorated bonus payment should be disallowed pursuant to §502(b)(7)(B) because the bonus was not due or payable on the petition date. This Court disagrees. As stated above, Merksamer's interest in his bonus vested when he performed under the contract. On the petition date, a prorated bonus was due and owing to Merksamer. The prorated bonus promised in the Letter Agreement is therefore "unpaid compensation" and shall be paid to Merksamer in addition to his claim for severance.

Priority Claims

Merksamer's proof of claim seeks a priority claim of $4,000. §507(a)(3) provides in relevant part:

allowed unsecured claims [are entitled to third priority], but only to the

> extent of $4,000 for each individual...earned within 90 days before the filing of the petition or the cessation of the debtor's business, whichever occurs first, for---(A) wages, salaries, or commissions, including, vacation, severance, and sick leave pay earned by an individual...

11 U.S.C. §507(a)(3)(A). To be entitled to a priority claim, the claim must have been "earned" within the 90-day period preceding the petition date. See In re Uly-Pak, Inc., 128 B.R. 763, 766-67 (Bankr. S.D. Ill. 1991).

Merksamer concedes that he is not entitled to a priority claim for any portion of the severance payment due to him because his entitlement to that sum vested on February 1, 1995, more than 90 days prior to the date of the bankruptcy petition. The parties dispute whether any portion of the bonus payment promised to Merksamer was "earned" within the 90-day period of §507. The Committee argues that Merksamer did not earn any right to a bonus during the 90-day period because the Letter Agreement provides that any right to the bonus "will be guaranteed and paid April 1, 1996." This Court, however, held supra that Merksamer was entitled to a pro rata share of his promised bonus because he performed in reliance of the promise and that the lack of promise to vest did not revoke the Debtor's obligation to pay. See Kulins, 121 Ill.App.3d at 526. Merksamer earned a pro rata bonus of approximately $13,800 during the 90-day period prior to the bankruptcy petition.[6]

[6] 90 days x $56,000 ÷ 365 = 13,808.22.

However, §507(a)(3) caps Merksamer's priority claim in the amount of $4,000.

Equitable Subordination

The Committee alternatively contends that Merksamer's claim, to the extent allowed, should be equitably subordinated. §510 of the Bankruptcy Code governs equitable subordination and states that a court may:

> (1) under the principles of equitable subordination, subordinate for the purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or
> (2) order that any lien securing such a subordinated claim be transferred to the estate.

11 U.S.C. §510(c). The Seventh Circuit has adopted the following three-part test to consider in determining whether to equitably subordinate a claim or interest:

> (1) the claimant creditor has engaged in some sort of inequitable misconduct; (2) the misconduct has resulted in injury to other creditors or in unfair advantage to the miscreant; and (3) subordination of the debt is [not] inconsistent with other provisions of the bankruptcy code.

In re Vitreous Steel Products, 911 F.2d 1223, 1237 (7th Cir. 1990), citing In re Mobile Steel Co., 563 F.2d 692, 702 (5th Cir. 1977). This inquiry must be made on a "case-by-case basis focusing on the fairness to other creditors." Vitreous Steel, 911 F.2d at 1237.

In this case, there is no evidence before the Court supporting the Committee's claim that Merksamer has engaged in inequitable conduct. The Committee's contentions that Merksamer caused the Debtor to issue him $23,339.61 in severance payments lacks merit. At the time the Debtor issued the checks to Merksamer, he had already been terminated from his Vice-President position and lacked the ability to "cause" the Debtor to do anything. Without evidence to the contrary, this Court finds that Merksamer did not engage in inequitable conduct and so his claim will not be subordinated.

Deduction of the $23,339.61 Payment

The Debtor's Plan is not a 100% payment plan; the Unsecured Creditors are receiving a percentage of their allowed claims. Merksamer, as an unsecured creditor, was not entitled to an advanced payment of $23,339.61 ("Advanced Payment") before any disbursements were made to other unsecured creditors under the Plan. Accordingly, any sum allowed to Merksamer must account for the $23,339.61 he already received, not as a deduction from the allowed claim, but rather, as a dollar for dollar credit against payments to creditors under the Plan.

This Court finds that the most equitable result is as follows: (1) Merksamer's priority claim will be allowed, however, he will not receive the $4,000 payment because that sum will be credited against the Advanced Payment already received; and (2) Merksamer's unsecured claim will be paid out as an unsecured claim according to the the Plan, provided that the remaining portion of the Advanced

Payment shall be deducted from any actual cash disbursement to be made to Merksamer.

CONCLUSION

For the foregoing reasons, Merksamer's motion for summary judgment is granted in part and denied in part. Merksamer's claim for severance pay, prorated bonus and priority will be allowed to the extent consistent with this opinion. Merksamer's claim for interest, costs and attorneys' fees is disallowed in its entirety. Merksamer's claim will not be subordinated.

ENTER:

ERWIN I. KATZ
United States Bankruptcy Judge

Dated: July 9 , 1997

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
HANDY ANDY HOME IMPROVEMENT CENTERS, INC.,	)	Case No. 95 B 21655
	)	
	)	Honorable Erwin I. Katz
Debtor.	)	

JUDGMENT ORDER

For the reasons set forth in the Court's Memorandum Opinion, IT IS HEREBY ORDERED that the Motion of Martin Merksamer ("Merksamer") for Summary Judgment on the objection of the Official Committee of Unsecured Trade Creditors of Handy Andy Home Improvement Centers, Inc. to Merksamer's Proof of Claim ("Claim") is granted in part and denied in part. The Claim is allowed in the total amount of $212,958.90. Payment on said claim shall be according to the terms of the Plan of Reorganization, but any disbursements of actual funds shall only be made when the amount of said disbursements exceeds $23,339.61. Merksamer's claim for interests, costs and attorney's fees shall be disallowed in its entirety.

ENTER:

ERWIN I. KATZ
United States Bankruptcy Judge

Dated: July 9, , 1997